SIEW KHOW SENG A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
HASAN LAH JCA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: N-05-82-2007]
4 MAY 2011 C

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against safe custody of person acquitted - Whether evidence showed appellant attacked deceased with intention of causing death - Prima facie case - Whether established - Whether appeal dismissed* D

CRIMINAL PROCEDURE: *Appeal - Petition of appeal - Whether limited to appeal against sentence only - Oral application made to enlarge grounds of appeal - Whether allowed - Whether appellant must abide by notice of appeal - Whether appellant not allowed to submit on grounds not raised in notice of appeal and petition of appeal - Courts of Judicature Act 1964, s. 56 - Rules of the Court of Appeal 1994, r. 27* E

The appellant was charged with murder under s. 302 of the Penal Code for slashing the deceased with a parang and hitting his head a few times with an iron rod. At the conclusion of the trial, the trial judge ruled that the appellant had established a defense of unsoundness of mind under s. 84 of the Penal Code and had ordered him to be confined in safe custody at the Sungai Buloh Prison pursuant to s. 348 of the Criminal Procedure Code. The appellant appealed against the said order. At the outset of the hearing of this appeal, the appellant made an oral application under s. 56 of the Courts of Judicature Act 1964 to enlarge the grounds of appeal on the ground that substantial justice may be done in this case, as the appellant's appeal was only limited to an appeal against sentence. F G H

Held (unanimously dismissing the appeal; affirming order of trial judge)
Per Hasan Lah JCA delivering the judgment of the court: I

(1) Rules are made to be complied with and the parties must not, for any flimsy reason, ignore the mandatory requirement of the law. Where the language of the law is couched in terms that

require mandatory compliance, there must be strict compliance. The appellant had not complied with the provisions of s. 56 of the Courts of Judicature Act 1964 and r. 27 of the Rules of the Court of Appeal 1994. In the circumstances, the appellant's oral application was unanimously dismissed. Further, the appellant must abide by the petition of appeal and the appellant should submit solely on the points of law or fact set out in the appellant's petition of appeal. The appellant must also abide by the appellants' notice of appeal, which was limited to sentence only. The appellant was therefore not allowed to submit on grounds not raised in the notice of appeal and the petition of appeal. (paras 15 & 17)

(2) The evidence against the appellant was overwhelming. The appellant had attacked the deceased in the presence of two eye witnesses (PW6 and PW8). Their evidence was not challenged by the defence. The deceased had died due to the injuries inflicted upon him by the appellant. The appellant had attacked the deceased with the intention of causing death. The trial judge had correctly ruled that a *prima facie* case had been proved against the appellant at the close of the case for the prosecution. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh atas kesalahan membunuh di bawah s. 302 Kanun Keseksaan kerana menetak simati dengan parang dan memukul kepala simati beberapa kali dengan batang besi. Pada akhir perbicaraan, hakim bicara telah memutuskan bahawa perayu telah membuktikan pembelaan hilang akal di bawah s. 84 Kanun Keseksaan dan telah mengarahkan perayu ditahan di bawah jagaan di Penjara Sungai Buloh di bawah s. 348 Kanun Tatacara Jenayah. Perayu membuat rayuan terhadap perintah tersebut. Di awal perbicaraan, perayu telah membuat permohonan lisan di bawah s. 56 Akta Mahkamah Kehakiman 1964 untuk memperluaskan alasan-alasan rayuan atas sebab keadilan substantial mungkin boleh dibuat di dalam kes ini, kerana rayuan perayu hanya terhad kepada rayuan terhadap hukuman.

Diputuskan (sebulat suara menolak rayuan; mengesahkan perintah hakim bicara)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Peraturan-peraturan telah dibuat untuk dipatuhi dan pihak-pihak terlibat tidak patut, untuk apa-apa sebab nipis, mengabaikan keperluan mandatori undang-undang. Di mana bahasa undang-undang diungkapkan di dalam syarat-syarat yang memerlukan pematuhan mandatori, ia harus dipatuhi dengan ketat. Perayu tidak mematuhi peruntukan-peruntukan s. 56 Akta Mahkamah Kehakiman 1964 dan k. 27 Kaedah-Kaedah Mahkamah Rayuan 1994. Dalam keadaan itu, permohonan lisan perayu dengan sebulat suara ditolak. Seterusnya, perayu mesti mematuhi petisyen rayuan dan perayu harus mengemukakan hanya perkara-perkara atau fakta-fakta undang-undang yang diberikan di dalam petisyen rayuan. Perayu oleh itu tidak dibenarkan mengemukakan alasan-alasan yang tidak dibangkitkan di dalam notis rayuan dan petisyen rayuan.

(2) Keterangan terhadap perayu adalah terlalu banyak. Perayu telah menyerang simati dalam kehadiran dua saksi (PW6 dan PW8). Keterangan mereka tidak dicabar oleh pihak pembelaan. Simati telah meninggal dunia akibat kecederaan yang diperlakukan terhadapnya oleh perayu. Perayu telah menyerang simati dengan niat menyebabkan kematian. Hakim bicara telah dengan betul memutuskan bahawa satu kes *prima facie* telah dibuktikan terhadap perayu di akhir kes pendakwaan.

Case(s) referred to:
Yan Wing Lee v. PP [1994] 2 CLJ 453 HC ***(refd)***
PP v. Japar Bakong & Others (Mahkamah Rayuan Criminal Appeal No: Q-05-82-2006) (Unreported) ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 51(2), 53, 56
Criminal Procedure Code, s. 348(1), (2)
Penal Code, ss. 84, 302
Rules of the Court of Appeal 1994, r. 27

For the appellant - Chong Joo Tian; M/s JT Chong Assocs
For the respondent - Mohamad Abazafree Mohamad Abbas DPP

[Appeal from High Court, Seremban; Criminal Trial No: 45-7-2002]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Hasan Lah JCA:

[1] The appellant was charged with murder under s. 302 of the Penal Code. The charge reads as follow:

B

> Bahawa kamu pada 21.3.2002 antara jam 4.00 petang hingga 4.15 petang, di belakang rumah No. 49, Kg. Tiong, Gemas, di dalam Daerah Tampin, di dalam Negeri, Negeri Sembilan, telah melakukan pembunuhan dengan menyebabkan kematian kepada SIOW WEE, (KP: 221217-71-5197), oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

C

[2] At the conclusion of the trial the learned trial judge ordered him to be confined in safe custody at the Sungai Buloh Prison pending an order of the Yang di Pertuan Besar Negeri Sembilan pursuant to s. 348(2) of the Criminal Procedure Code.

D

[3] The appellant appealed against the order made by the learned trial judge. His Notice of Appeal was filed through the Prisons Department. His appeal was only confined to the sentence. The relevant part of his Notice of Appeal is as follows:

E

> Take Notice that Siew Khow Seng who was convicted in the High Court in Seremban at Negeri Sembilan on 03 day of September 2007 for the offence of Sek. 302 KK and sentenced to Tertuduh ditahan dalam jagaan selamat di Penjara Sungai Buloh, Selangor dan menerimanya sehingga perintah selanjutnya daripada DYMM Yang Dipertuan Besar Negeri Sembilan di bawah Sek. 348 (ii) Kanun Prosedur Jenayah and who is now a prisoner in this prison has informed me that he wishes to appeal to the Federal Court against his conviction*

F

G

> sentence*
>
> conviction and sentence*
>
> The grounds on which he wishes to appeal are stated by him as follows: (See Note)
>
> Perayu merayu agar hukumannya dapat diringankan dan Petisyen Rayuan akan dihantar kemudian.

H

[4] The grounds stated in his petition of appeal are as follows:

I

> (1) Untuk makluman Tuan Yang Arif, saya mengaku bersalah dan ini telah menjimatkan kos perbelanjaan pihak mahkamah.

(2) Tuan Yang Arif, saya mohon pihak mahkamah memberi peluang kepada saya untuk memperbaiki diri saya dan saya berjanji tidak akan melakukan atau mengulangi perbuatan ini di masa akan datang.

(3) Tuan Yang Arif, saya juga merasa amat bersalah dan insaf akan perbuatan yang saya lakukan. Saya berjanji akan menjadi seorang yang berguna kepada keluarga, bangsa dan negara.

[5] The brief facts of the case are these. The incident giving rise to this case took place at about 4.45pm on 21 March 2002 behind house no. 49, Kg Tiong, Gemas, Negeri Sembilan. At that time Niew Kim Cheok @ Niew Tiow Yok (PW6) and his son, Niew Jik Wen (PW8) were doing repair works to the deceased's toilet behind the said house. The deceased was with them then. The appellant came to the said house armed with a parang. The appellant then slashed the deceased, who was his own father, with the parang a few times. The deceased then fell to the ground. While the deceased was lying on the ground the appellant hit his head a few times with an iron rod. Both PW6 and PW8 tried to stop the appellant from slashing and hitting the deceased but they were unsuccessful.

[6] The deceased who was seriously injured was sent to Hospital Segamat, Johor. He died there at about 8pm on the same day.

[7] The post-mortem on the deceased was done on 23 March 2002 by Dr Shahidan bin Mohd Nor (PW12), the Forensic Pathologist. In PW12's opinion the cause of the deceased's death was Neurogenic Shock due to injuries to his soft tissues.

[8] After the conclusion of the prosecution case the learned trial judge ruled that a *prima facie* case had been proved against the appellant. He was ordered to make his defence on the offence charged.

[9] The appellant did not give evidence in his defence. Instead, he called Dr Nor Hashim bin Ahmad (DW1). DW1 was a Psychiatrist attached to Hospital Permai, Johor Bahru at the material time. He testified that the appellant was referred to him on 1 April 2002. In his opinion at that time the appellant was suffering from schizophrenia. As a result of his mental disorder the appellant, at the time of the alleged commission of the offence, was incapable of knowing the nature of the act.

[10] At the conclusion of the trial the learned trial judge ruled that the appellant, on a balance of probabilities, had established a defence of unsoundness of mind under s. 84 of the Penal Code. The learned trial judge found the appellant had committed the act but he acquitted the appellant because at the time he committed the act he, by reason of unsoundness of mind, was incapable of knowing the nature of the act and that it was wrong and contrary to law. The learned trial judge then made the mandatory order under s. 348(1) of the Criminal Procedure Code against the appellant.

[11] At the outset of the hearing of this appeal learned counsel for the appellant made an oral application under s. 56 of the Courts of Judicature Act 1964 to enlarge the grounds of appeal on the ground that substantial justice may be done in this case, as the appellant's appeal was only limited to an appeal against sentence. There was no explanation given by learned counsel for the appellant why a proper application was not made to amend the notice of appeal and the petition of appeal so as to include the appeal against the whole decision of the learned trial judge.

[12] The learned Deputy Public Prosecutor objected to the oral application made by learned counsel for the appellant. In support of his argument the learned Deputy Public Prosecutor cited the case of *Yan Wing Lee v. PP* [1994] 2 CLJ 453 where Hj Abdul Malik bin Hj Ishak JC (as he then was) opined:

> From the authorities cited above, the legal situation appears to be that the appellant must abide by the petition of appeal and the learned counsel for the appellant, in all fairness to the learned deputy public prosecutor, should submit solely on the points of law or fact as set out in the petition of appeal and should not dabble on points of law or fact not set out in the petition of appeal, In my judgment, s. 307(vi) of the Criminal Procedure Code (F.M.S. Cap 6) is couched mandatorily and any failure to observe it would be fatal. In the circumstances, this Court is entitled to disregard the grounds that were not itemised in the petition of appeal.

[13] Section 56 of the Courts of Judicature Act 1964 provides:

> 56. The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon which such terms and with such directions as it may

> consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by section 51 or 53.

[14] Rule 27 of the Rules of the Court of Appeal 1994 provides:

(a) All applications to the court shall unless otherwise provided be made by motion and shall be heard in open court.

(b) A notice of motion shall be substantially in Form 4 in the First Schedule.

(c) Notice of motion shall be served on the parties concerned not less than seven days before the return day, unless the court otherwise orders. Applications for leave to give shorter notice may be made by motion *ex parte*.

(d) Affidavits may be filed, read and used in like manner as upon a motion in the High Court.

[15] Learned counsel for the appellant clearly did not comply with that provision and he did not provide any reasons for not complying with it. We must stress here that rules are made to be complied with and the parties must not, for any flimsy reason, ignore the mandatory requirement of the law. Where the language of the law is couched in terms that require mandatory compliance, there must be strict compliance (see *PP v. Japar Bakong & others* (Mahkamah Rayuan Criminal Appeal No: Q-05-82-2006). In the circumstances we unanimously dismissed learned counsel's oral application.

[16] The next issue to be dealt with is whether learned counsel for the appellant should be allowed to argue against the whole decision of the learned trial judge. We had considered the relevant provisions of law relating to this issue. The relevant provisions are sub-ss. (2) of s. 51 and s. 53 of the Courts of Judicature Act 1964, which are as follows:

> 51(2) Every notice of appeal shall state shortly the substance of the judgment appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate, and, except where the notice of appeal is given orally under section 54, shall be signed by the appellant or his advocate:

A Provided that, in a case of an appeal under section 50(2), the computation of the aforesaid period of fourteen days shall commence from the date immediately after leave has been granted by the Court of Appeal.

B 53(2) Every petition of appeal shall be signed by the appellant or his advocate and shall contain particulars of the matters of law or of fact in regard to which the [High Court] is alleged to have erred, and, except by leave of the [Court of Appeal], the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those set forth in the petition.

C **[17]** Looking at the relevant provisions of law and the case law we agreed with the decision in *Yan Wing Lee* that the appellant must abide by the petition of appeal and learned counsel for the appellant should submit solely on the points of law or fact set out in the appellant's Petition of Appeal. In the instant appeal, learned D counsel for the appellant must also abide by the appellant's Notice of Appeal, which was limited to sentence only. Learned counsel for the appellant was therefore not allowed to submit on grounds not raised in the Notice of Appeal and the Petition of Appeal.

E **[18]** In view of our unanimous decision learned counsel did not make any submission on the order made by the learned trial judge under s. 348(1) of the Criminal Procedure Code. It is to be noted that the order under that s. 348(1) is mandatory.

F **[19]** For completeness we would like to state here that we had carefully considered the evidence adduced in the trial and the judgment of the learned trial judge and we are of the view that the evidence against the appellant was overwhelming. The appellant attacked the deceased in the presence of two eye G witnesses (PW6 and PW8) who testified in court. Their evidence was not challenged by the defence. The deceased died due to the injuries inflicted upon him by the appellant. The evidence showed that the appellant attacked the deceased with the intention of causing his death. On the evidence available the learned trial judge, H in our view, had correctly ruled that a *prima facie* case had been proved against the appellant at the close of the case for the prosecution.

[20] For the reasons given we unanimously dismissed the appeal I and the order of the learned trial judge affirmed.